

**STATE OF WISCONSIN  
Department of Commerce**

---

*In the Manner of the PECFA Appeal of*

Keith Fredrick  
Berlin Feed, Inc.  
328 S. Church  
Berlin WI 54923

PECFA Claim #54923-2145-28  
Hearing #95-13

---

**Final Decision**

---

**P R E L I M I N A R Y   R E C I T**

Pursuant to a petition for hearing filed November 14, 1994, under § 101.02(6)(e), Wis. Stats., and §ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations (the predecessor agency to the Department of Commerce), a hearing was held on September 19, 1995, at Madison, Wisconsin. A proposed decision was issued on March 22, 1996, and the parties were provided a period of twenty (20) days to file objections.

The issues for determination are:

Whether the department's decision denying reimbursement to the appellant in the amount of \$19,375.89 was correct in the following respects:

- (1) Whether the department correctly determined the remaining amount of deductible to be assessed against the final reimbursement by combining the remaining East Side deductible with the remaining West Side deductible;
- (2) Whether the department's decision to deny the priority shipping costs claimed by the appellant was correct; and
- (3) Whether the department's decision to deny the costs associated with the replacement of the original remedial system was correct.

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Keith Frederick and Berlin Feed, Inc.  
By: Attorney Ted A. Warpinski  
Friebert, Finerty & St. John, S.C.  
Two Plaza East - Suite 1250  
330 East Kilbourn Avenue  
Milwaukee WI 53202

Department of Industry, Labor and Human Relations (effective July 1, 1996,  
the Department of Commerce) By: Attorney Kristiane Randal  
Wis. Department of Commerce  
P.O. Box 7969  
Madison WI 53707

The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Secretary.

The matter now being ready for decision, I hereby issue the following

### **FINAL DECISION**

The Proposed Decision dated March 22, 1996, is hereby adopted as the final decision of the department with the following modifications:

The Discussion, Conclusion of Law and Proposed Decision running from line 34 of page 5 to the end of the document are deleted and replaced by the following:

#### **DISCUSSION**

The third issue to be decided is whether the department's decision to deny the costs associated with the replacement of the original remedial system was correct.

The appellant has asserted that the department erred in denying the cost of equipment associated with the original remedial system and not reused when a replacement remedial system was installed. Specifically, the appellant asserted that the department erred when it excluded \$15,218.72 for equipment associated with work done by M.L. Fuhrman that was not reused by Geraghty and Miller because those identical costs were eligible for reimbursement under the program and by upgrading to another remedial system, the appellant actually saved money for the fund.

The record is not clear on the core issue of whether or not the original remediation work conducted by M.L. Fuhrman was incomplete, incompetent or a non-effective cleanup action which was not based upon sound professional and scientific judgment.

Although I believe that further consideration of this issue is required, I do not agree with the appellant's contention that the department bears the burden of proving that these costs fit under an exclusionary provision of the code. The appellant continues to have the burden of showing that the costs claimed are in fact eligible for reimbursement.

On remand, the hearing examiner should employ the means necessary to review whether the work done by M.L. Fuhrman was adequately complete, competent, effective, and based on sound professional and scientific judgment.

### CONCLUSION OF LAW

Further consideration is required as to whether the department properly denied reimbursement in the amount of \$15,218.72 for the cost associated with the replacement of the original remedial system, within the meaning of sec. 101.143 (4), Stats., and sec. ILHR 47.30, Wis. Admin. Code.

### DECISION

The decision of the Department of Industry, Labor and Human Relations dated October 21, 1994, denying the appellant's request for reimbursement in the amount of \$19,375.89 under the PECFA program, is affirmed as to the issues relating to the determination of the remaining amount of the deductible and the denial of reimbursement for priority shipping costs, in the total amount of \$4,157.17, and remanded for further consideration of the denial of reimbursement for the cost of the replacement of the original remedial system, in the amount of \$15,218.72.

### **NOTICE TO PARTIES**

#### Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to the Department of Commerce, Office of the Secretary, 123 W, Washington Avenue, 9th Floor, P. O. Box 7970, Madison, WI 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes.

#### Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing if you ask for one), The petition for judicial review must be served on the Department of Commerce, Office of the Secretary, 123 W. Washington Avenue, 9th Floor, P. O. Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Dated and mailed: 5-30-97

Christopher Mohrman, Executive Assistant  
Department of Commerce  
123 W. Washington Avenue  
Madison WI 53703

cc: Parties in Interest and counsel

**STATE OF WISCONSIN  
DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS**

**IN THE MATTER OF: The claim for  
Reimbursement under the PECFA  
Program by**

MADISON HEARING OFFICE  
1801 Aberg Ave. Suite A  
P.O. Box 7975  
Madison, WI 53707-7975  
Telephone: (608) 242-4818  
Fax: (608) 242-4813

Keith Fredrick  
Berlin Feed, Inc.  
328 S Church  
Berlin, Wi. 54923

Appellant,

vs.

PECFA CLAIM #54923-21545-28

Secretary, Wisconsin Department of  
Industry, Labor and Human Relations

Hearing Number: 95-13

Respondent

---

**PROPOSED DECISION**

---

**NOTICE OF RIGHTS**

Attached are the Proposed Findings of Fact, Conclusions of law, and Order in the above stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Richard C. Wegner, Deputy Secretary of the Department of Industry, Labor and Human Relations, who is the individual designated to make the FINAL Decision of the Department of Industry, Labor and Human Relations in this matter.

STATE HEARING EXAMINER:

Arthur J. Schneider

DATED AND MAILED:

\*\*\*\*\*

MAILED TO:

Appellant Agent or Attorney

Attorney Ted A. Warpinski  
Friebert, Finerty & St John  
Two Plaza East, J1250  
330 East Kilbourn Avenue  
(414) 271-0130

Department of Industry, Labor  
and Human Relations

Kristiane Randal  
Assistant Legal Counsel  
P.O. Box 7946  
Madison, WI 53707-7946  
(608) 267-4433

## **PRELIMINARY RECITALS**

Pursuant to a petition filed on November 17, 1994, under Section 101.02 (6) (e) , Wis. Stats., and Section ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, a hearing was held on September 19, 1995 at Madison, Wisconsin, before Arthur J. Schneider, Administrative Law Judge, acting as a Hearing Examiner.

The issues for determination are:

A. Whether the Department's decision dated October 21, 1994, not to approve a request by the appellant for reimbursement in the amount of \$19,375.89 under the Petroleum Environmental Cleanup Fund Act ("PECFA") was correct as follows:

1. Whether the Department correctly determined the remaining amount of deductible to be assessed against the final reimbursement by combining the remaining East Site deductible with the remaining West Site deductible.

2. Whether the Department's decision to deny the priority shipping costs claimed by the appellant was correct.

3. Whether the Department's decision to deny the costs associated with the replacement of the original remedial system was correct.

### **PARTIES IN INTEREST:**

Keith Fredrick,  
Berlin Feed, Inc.  
328 S Church  
Berlin, WI. 54923

Attorney Ted A. Warpinski  
Friebert, Finerty & St John, S.C.  
Two Plaza East-Suite 1250  
330 East Kilbourn Avenue  
Milwaukee, WI 53202  
(414) 271-0130

Department of Industry, Labor and Human Relations 210 East Washington Avenue  
P.O. Box 7946  
Madison, WI 53707-7946  
by: Kristiane Randal  
Assistant Legal Counsel

## **FINDINGS OF FACT**

1. On October 1, 1990, Berlin Feed, Inc., (appellant) purchased from Ripon Feeds, property located at 328 S. Church Street, Berlin, Wisconsin. Conoco, Inc., operated a service station and bulk petroleum storage facility on the property from 1920 until mid-1960, when the property was purchased by Ripon Feeds.
2. Prior to the transfer of the property to the appellant, Ripon Feeds arranged for the removal of a 300-gallon underground storage tank (UST) from Southeast corner of the property (East Site).
3. During the excavation of the UST, petroleum-contaminated soils were found. Ripon Feeds retained the M.L. Furhman Co., Inc., (Furhman) to investigate the extent of the contamination
4. During the investigation petroleum contaminated soil and groundwater was also found on the Western side of the property (West site). Furhman then recommended a separate soil and groundwater remediation plan for the West Site.
5. In March of 1992 Furhman proceeded with its plan. However, the appellant questioned the efficiency and cost effectiveness of the Furhman plan.
6. The appellant then sought from Geraghty and Miller another proposal on how to handle the cleanup. Geraghty and Miller recommended a different method of cleanup which was approved by Wisconsin Department of Natural Resources (DNR)
7. The new system was installed and became operational in May of 1994.
8. During December of 1992, the appellant submitted a claim for reimbursement from the Petroleum Environmental Cleanup Fund Act (PECFA). The appellant claimed expenses in the amount of \$97,026.62.
9. The department allowed reimbursement in the amount of \$75,923.41. The department assessed a total deductible for both sites in the amount of \$8,995.97. Department records indicate that the \$8995.97 figure was divided equally between the East Site and the West Site. Therefore, each site had a remaining deductible of \$3002.02.
10. On November 22, 1993, the appellant submitted a total request for reimbursement in the amount of \$175,263.38.
11. The department responded on October '21, 1994 by allowing reimbursement in the amount of \$144,735.89. The department assessed against the reimbursement an additional deductible of \$6004.03 by combining the remaining deductible from the East site and the West site.

## **DISCUSSION**

The initial issue to be decided is whether the department correctly determined the remaining amount of deductible to be assessed against the last reimbursement by combining the remaining East Site deductible with the remaining, West site deductible.

The appellant contends that the last claim for reimbursement only included costs from the West Site and therefore only the West Site's remaining deductible of \$3,002.02 should have been assessed against the reimbursement. This contention cannot be sustained. Both parties agree and the evidence shows that a deductible was assessed against the East and Western sites. ILHR Wis. Admin. Code provides that all PECFA awards are subject to a deductible for each occurrence. The deductible at the time of the claim by the appellant was \$2500 plus five percent of all eligible cost per each occurrence but not more than \$7500 per occurrence. Section 101.143(1)(cs), Wis. Stats. provides that an occurrence is defined to mean a contiguous contaminated area resulting from one or more petroleum product discharges. There were in fact two occurrences and each site should have been assessed a \$4,497.98 deductible (2,500 for each occurrence plus one-half of the \$3,995.97 costs eligible for the additional 5% deduction).

On December 1, 1992, when the initial claim for reimbursement was made by the appellant, the department did correctly divide the deductible, as explained above, between the two sites. It also clearly notified the appellant that in order to allocate costs properly between each site, all future PECFA reimbursement claim submittals must be separated according to the plumes (occurrences).

The appellant disregarded this notice and failed to clearly distinguish which costs were allocated to which site when it made its final submission for reimbursement. The department then reasonably combined the remaining deductible from the East Site with the remaining deductible from the West Site in order to determine the correct amount of deductible to be assessed against the reimbursement. The appellant did not provide sufficient evidence then or now to correctly determine which expenses should be assessed against the East Site and which expenses should be assessed against the West Site in order to determine whether as alleged by the appellant, all remaining expenses were the West Site. Under the circumstances, the department correctly determined that both of the remaining deductibles from the East and West Site should be added together and applied against the final request for reimbursement.

## **CONCLUSION OF LAW**

The Department properly denied the appellant's request for reimbursement under the PECFA program of \$3,000.02 in additional deductible assessed from the East Site.



## DISCUSSION

The second issue to be decided is whether the department's decision to deny the priority shipping costs claimed by the appellant was correct.

The appellant contended that the shipping charges attributable to the use of Federal Express should be eligible for PECFA reimbursement. Specifically, those shipping charges should be eligible for reimbursement because the use of Federal Express was necessary for returning rented equipment on time and for sending samples to a laboratory. This contention cannot be sustained. The burden of proof for proving that costs are eligible for reimbursement under the PECFA program is upon the appellant. The burden of proof applies both at the time of the claim itself and also at the hearing. Danco Prairie FS Cooperative vs. DILHR (Final Decision October 17, 1994.) In Danco Prairie, the Deputy Secretary adopted a proposed decision which stated that "it would appear that claimants will normally have the burden of proving their eligibility for PECFA reimbursements," both in the claim itself and also in the administrative hearing to appeal a decision by DILHR denying reimbursement of particular costs." Proposed Decision, at 6.

Section 101.043(4) (c)4., Stats., specifically excludes from payment all costs which the department determines to be "unreasonable". In this case, the department has determined that the use of Federal Express instead of lower cost vendors is unreasonable. The testimony presented at the hearing held on this matter did not establish that the appellant was justified in using the more expensive Federal Express shipper.

## CONCLUSIONS OF LAW

The Department properly denied reimbursement of the priority shipping costs claimed by the appellant within the meaning of section 101.143(4) of the statutes and chapter ILHR 47.30 of the Wisconsin Administrative Code.

## DISCUSSION

The third issue to be decided is whether the department's decision to deny the costs associated with replacement of the original remedial system was correct.

The appellant has asserted that the department erred in denying the cost of equipment associated with the original remedial system and not reused when a replacement remedial system was installed. Specifically, the appellant asserted that the department erred when it excluded \$15,218.72 for equipment associated with work done by M. L. Fuhrman that was not reused by Geraghty and Miller because those initial costs were eligible for reimbursement under the program and by upgrading to another remedial system, the appellant actually saved money for the fund. This assertion is also without merit. The appellant had been clearly notified that costs associated with inefficient, ineffective or non cost-effective cleanup actions which were not based upon sound professional and scientific judgment would be ineligible for reimbursement. The evidence showed that the equipment valued at \$15,218.72 was not used by Geraghty and Miller and the updated remedial system because it was not cost effective and it did not address all the contamination problems on the Site. The PECFA program does not provide for reimbursement

for technology which was inadequate or improperly designed for the purpose which it was used. The department correctly denied reimbursement of the \$15,218.72 for equipment associated with work done M. L. Fuhrman which was not reused by Geraghty and Miller.

#### CONCLUSIONS OF LAW

The Department properly denied reimbursement in the amount of \$15,218.72 for the cost associated with the replacement of the original remedial system, within the meaning of section 101.143(4) of the statutes and ILHR 47.30 of the Wisconsin Administrative Code.

#### PROPOSED DECISION

The decision of the Department of Industry, Labor and Human Relations, dated October 21, 1994, denying the appellant's request for reimbursement in the amount of \$19,375.89 under the PECFA program is affirmed.

Dated this 22<sup>nd</sup> of March, 1996.

#### APPEAL TRIBUNAL

by: Arthur J. Schneider  
Administrative Law Judge  
Madison Hearing Office  
1801 Aberg Avenue, Suite A  
P.O. Box 7975  
Madison, WI 53707-7975